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Copyright and Research: A Different Perspective

*Jan Velterop**

Abstract

Recently, two articles have appeared in SCRIPT-ed on 'Copyright and Research'. One by Kevin Taylor, giving the perspective of an academic publisher (SCRIPT-ed 4:2), and one by Andrew Adams, from the perspective of an 'archivangelist' (SCRIPT-ed 4:3). The latter is a critique of the former. Neither article sheds much light on the role copyright actually plays in publishing research results in peer-reviewed journals. Taylor brings authors' remuneration into the discussion, a concept quite alien to most primary research literature, where recognition and citation are the coin of the realm, and Adams seems to argue that copyright somehow impedes open access without explaining how or why that should be the case. This brief article aims to address the actual role copyright plays in the primary research literature and the appropriateness of that role.

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* Director of Open Access at Springer. However, this article is written on a personal title and does not necessarily reflect the company's views.

1. Introduction

Whilst copyright is more and more regarded as (intellectual) ‘property’ (though reportedly that is a quite recent phenomenon – Lemley traces modern usage of the term to the foundation of the World Intellectual Property Organisation – and it has serious drawbacks¹), its original intent is to grant authors a limited right to depart from the norm of a competitive marketplace as an inducement to develop new work, in order to “promote the progress of science and useful arts” as Article I, Section 8, of the United States Constitution has it. The monopoly that copyright grants the author is, however, limited when it appears to conflict with the overriding public interest in encouraging creation of new intellectual and artistic works generally.² The origins of ‘fair use’ and ‘fair dealing’ are to be found in this principle.

The economic rights associated with copyright are often ‘bundled’ with the moral rights, such as the right of attribution, or the right to have one’s work published under a pseudonym (or anonymously, for that matter) and the right of integrity. In some jurisdictions, such as the USA, these moral rights are not seen as part of copyright, but in so-called ‘Roman law’ countries they are. In those countries, copyright is often referred to as ‘author’s rights’ (*droit d’auteur*, *auteursrecht*, *derecho de autor*) or ‘originator’s rights’ (*Urheberrecht*).

Article 6bis of the *Berne Convention*, which protects attribution and integrity, recognises that the economic and moral rights are distinct, stating that:

*“Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”*³

This distinction in article 6bis is important in that it makes clear that when copyright is transferred, e.g. to a publisher, it concerns only the economic rights and not the author’s moral rights.

As moral rights are not contentious in science publishing and cannot be traded anyway, they need not be addressed here. Economic rights, on the other hand, are traded, and used as a means of exchange, a proxy for money, in the formal publication of research results in peer-reviewed journals. When I henceforth use the term ‘copyright’ in this article, it refers only to those economic rights.

¹ M A Lemley, ‘Property, Intellectual Property, and Free Riding’ (2000) 83 *Texas Law Review* 1031, available at SSRN: <http://ssrn.com/abstract=582602> or DOI: [10.2139/ssrn.582602](https://doi.org/10.2139/ssrn.582602).

² S Fishman, *The Copyright Handbook—How to Protect & Use Written Works*, 4th edn (1997 Berkeley, Nolo Press) p. 2/2.

³ *Berne Convention for the Protection of Literary and Artistic Works*, September 9, 1886, amended on September 28, 1979, article 6bis (1) http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726

2. Publish or Perish

Nowadays it is very easy and cheap to publish anything, especially on the internet. For authors to ensure open access to their research results and to share them with anybody who cares to see them should therefore not be a problem at all. Except that sharing information that lacks a badge of authority is not seen as very helpful when it comes to scientific knowledge. The reader needs to be able to see if the knowledge presented is accepted by the academic community as valid, i.e. that the methodology is sound and that any conclusions are supported by the data. Moreover, researchers need that badge of acceptance by their peers. Sharing knowledge is not enough; it must be peer-reviewed knowledge. Not so much ‘publish or perish’ as ‘have your work peer-reviewed or perish’. When the term ‘publishing’ is used in academic circles, particularly in the context of journals, this is commonly taken to mean ‘publishing in a peer-reviewed journal’; it is important to realise then that it is less the function of publishing *per se* that researchers are after, rather the acquisition of this ‘badge of acceptance’ by their peers.

3. The Role of Publishers

Publishers provide the function of publishing *per se* as well, of course – refinement through editing, dissemination, conforming to standards for citation and for archiving, *et cetera* – but in the world of the internet in which we now live, these are almost secondary functions. Their primary function is to provide the structure and processes for the acquisition of this ‘badge of acceptance’. This badge, the result of peer-review, is crucial not only for a scientist’s career and funding prospects, but also for safeguarding the coherence and integrity of the scientific record as a whole (I used to call that “keeping the minutes of science”⁴) and the way the individual articles ‘hang together’ via proper and accurate citations and references. This ‘badge’ also confers a layering, stratification of the scientific record and in general an organisational guidance. This ‘badge of acceptance by peers’ is represented in the title of the journal in which the article is published.

4. The Role of Copyright

Publishers and scholarly societies that are engaged in journal publishing provide, via their journals, the structure and services needed for the acquisition of the ‘badge of acceptance’. This involves investment in work and capital, so they need to be paid in order to be able to recoup their costs and to maintain an incentive to keep investing work and capital by the potential and prospect of making some profit. Various ways of payment have been developed over the decades, or rather centuries, of science publishing, such as charges to authors (page charges), charges for advertisements, subsidies and grants, and, of course, combinations of the above, but the prevailing method is the subscription model, whereby the readers (vicariously, their institutional libraries) foot the bill. For subscriptions to work, the publisher needs to have some

⁴ J Velterop, “Keeping the Minutes of Science” in Proceedings of Electronic Libraries and Visual Information Research (ELVIRA) Conference, Aslib, London, No. 2-14 May 1995.

exclusivity to the content. This is where copyright comes in: publishers accept the transfer of copyright as payment for their services. This form of ‘payment’ can subsequently be monetised via the sale of subscriptions, because of the economic exclusivity that comes with copyright. Of course there are risks involved. What if the publisher does not sell enough subscriptions to cover the costs? Publishers take this risk on the implicit understanding that if they do manage to attract more highly-cited or highly-read authors to their journal and on the strength of that are able to sell more subscriptions than strictly needed to cover the cost, they make a profit that is regarded as reflecting their quality and skill as a publisher. In reality many publishers have a portfolio of journals some of which do make money and some which make a loss, the latter being compensated by the profits of the former. The definition of a successful publisher is one that manages, over time, to build up a portfolio with more of the profitable kind than of the loss-making variety.

5. Appropriateness

There is nothing intrinsically inappropriate in trading copyrights and using them as a means of exchange of value. But there are a few reasons why it may have become, in this day and age of the internet, sub-optimal and ineffective. In other words, not fit for purpose any more. For authors and their financial backers – be they funding agencies, universities or other research institutions; in short, the entire academic community – the opportunities of having universal accessibility of the research results that come out of the projects they have undertaken, are lost due to the intrinsic dissemination-limiting characteristics of exclusive economic rights if used in this way. Universal accessibility to research results, at least ‘universal’ amongst fellow scientists and those aspiring to add to the human understanding of nature in the widest sense of the word, is a great good. The potential of brains to add significantly to humanity’s knowledge is not limited to those of researchers in the happy circumstance of having the means for unfettered access to these results. But for publishers, too, the limits of a system of being paid by the transfer of copyrights are in sight. Due to the ease with which the actual content of what is published can be made available outside the formal publishing process, and the movement in the direction of making this availability compulsory as a condition of being funded, the value of the supposedly exclusive economic rights that are transferred with copyrights is eroding, because they are just no longer exclusive. The service of attaching the crucially important formal ‘badge of acceptance’ of the academic community, the peer-reviewed journal citation, to the content of scientific articles is one that is not served well by being dependent on increasingly questionable proxy ‘payments’.

And there is another reason why financially sustaining this service by copyright transfer and subsequent sale of subscriptions and licences is running into difficulties. There is a movement whereby the value of scientific articles is more and more defined by usage statistics. This, too, presents a difficulty for authors and publishers alike. When more highly-used articles are indeed seen as more valuable than articles with lower usage figures, there is a real danger that decisions on whether an article is worth publishing will be informed by estimates and judgements regarding expected usage rather than intrinsic scientific merit irrespective of, usually short-term, usage prospects. Authors and publishers in disciplines with traditionally relatively low usage figures may find it increasingly difficult respectively to get published or to sell subscriptions.

6. Conclusion

There is an irony in the fact that the purpose of copyright – a system of bestowing temporary exclusive economic rights, devised to promote the progress of science and useful arts – is, in an internet environment, likely to be better served by economic models that avoid exclusive economic use of copyright altogether. It may be time to replace the use of copyrights as a proxy for money when paying for the service of formal publication in peer-reviewed journals by the real thing: money. Doing so will obliterate the need to ‘transubstantiate’ copyright (and its inherent restrictiveness) into money, which is after all what selling subscriptions does. As a result, no longer depending on subscriptions for income, enables open access, immediate and at source, to flourish both for the benefit of science and society and as a business opportunity for publishers.